In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 627

LIBBEY-OWENS-FORD GLASS COMPANY, PETITIONER

v.

FRANK W. MCCULLOCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. Petitioner's employees are represented for collective bargaining purposes in three different bargaining units by the United Glass & Ceramic Workers of North America, AFL-CIO. One unit covers eight plants, and there are separate units for plants at Brackenridge, Pennsylvania, and Lathrop, California. Upon a petition filed by the Union, the Board directed an election among the employees at the latter plants to determine whether they wished to be included in a single bargaining unit covering all ten

plants, or to continue to be separately represented. 169 NLRB No. 2 (Pet. App. 15a-30a).

The company then brought this suit in the district court to enjoin the elections and to prevent the Board from changing the existing bargaining units, contending that the Board lacks authority to conduct an election merely for unit clarification purposes. The district court enjoined the Board from conducting the elections and from issuing an order clarifying the unit (Pet. App. 10a). Pending appeal, the court of appeals modified the injunction to permit the Board to proceed with the elections,[1] but continued to enjoin the Board from issuing an order of unit clarification (Pet. App. 11a). Thereafter, the court of appeals (Judge Tamm dissenting) held that the district court had no jurisdiction to entertain the suit and directed dismissal of the complaint.[2]

2. The sole question presented is whether under the principles enunciated in *Leedom* v. *Kyne*, 358 U.S. 184, the district court had jurisdiction to review the Board's action.[3] It is well settled that *Lee-*

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[1] In the ensuing elections, the employees at the two plants voted to join the other eight plants to form a single ten-plant unit.

[2] Petitioner applied for rehearing and rehearing *en banc* and for stays in the court of appeals and this Court, all of which were denied.

[3] On three recent occasions this Court has declined to review court of appeals decisions denying the district court's jurisdiction to review comparable claims that the Board acted beyond its statutory authority. *Kingsport Press, Inc.* v. *McCulloch*, 379 U.S. 931; *Machinery etc. Local Union No. 714* v. *Madden*, 382 U.S. 822; *Miami Herald Pub. Co.* v. *Boire*, 382 U.S. 824.

dom v. *Kyne*, creates only a narrow exception to the general rule that the district courts have no jurisdiction to review Board actions in representation proceedings. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 480-481; *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 17; cf. *Brotherhood of Railway Clerks* v. *Employees Association*, 380 U.S. 650, 659-660. *Kyne* held only that the district court has jurisdiction where a suit is "one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." In *Kyne* the Board concededly violated a specific statutory prohibition [4] by placing professional and nonprofessional employees in the same bargaining unit without first affording the former a separate vote. Moreover, the court emphasized that the absence of district court jurisdiction in that case "would mean 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control * * * to protect and enforce that right" (*id.*, at 190).[5]

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[4] Section 9(b)(1) of the Act provides that, in determining the unit appropriate for collective bargaining purposes, "the Board shall not * * * decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in that unit."

[5] In *Kyne*, due to the peculiar circumstances of that case (see 249 F. 2d 490, 492 (C.A. D.C.)), the normal review procedure did not provide an effective means of obtaining review of the unit issue, thereby necessitating district court relief in order to protect the statutory right accorded the professional employees.

The Act, however, does not expressly preclude the Board from utilizing an election for the purposes of clarifying or modifying a prior bargaining unit determination. Section 9(c)(1) (Pet. App. 32a-33a) provides that the Board must conduct an election if it finds after a hearing that a question of representation exists; but it does not prohibit the Board from holding elections in other circumstances. On the contrary, the Board's broad power under Section 9(b) (Pet. App. 31a) to establish the appropriate bargaining unit suggests that it may use any reasonable means, including an election, to exercise that power properly.[6] Cf. *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 267-268. See, also N.L.R.B. Rules and Regulations, 29 CFR § 102.63(b).[7]

Moreover, here petitioner has an adequate means of obtaining review of its contentions in the court of

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[6] Since the Board's power to hold the unit clarification election here is derived from Section 9(b) and not Section 9(c)(1), there is no relevance to petitioner's argument that the court below ignored the express requirement of a question concerning representation imposed by the latter section (Pet. 10-14, 17-18). Similarly, petitioner's contention that there is a conflict between the court below and other courts of appeals in the application of *Kyne, supra* (Pet. 20-21) rests on its erroneous assumption that the court below was focusing on Section 9(c)(1) in concluding that the Board's action was not "plainly" or "clearly" in contravention of the Act. Finally, since only the International Union was certified as the representative for each of the units involved, there is no substance to petitioner's further contention (Pet. 7, 14) that the Board's action would result in a new and different representative.

[7] The cases cited by petitioner at Pet. 4 follow *The Bell Telephone Co. of Penn.*, 118 NLRB 371, which was overruled by *Brotherhood of Locomotive Firemen & Enginemen*, 145 NLRB 1521.

appeals. If the Board issues its unit clarification order combining the ten plants into a single unit, petitioner may refuse to bargain for that unit. If the Union then files an unfair labor practice charge and the Board issues an order directing petitioner to bargain, petitioner may then challenge the unit determination in the court of appeals as an incident to judicial review of the Board's order. This is the normal procedure by which unit determinations of the Board are reviewed (see *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-480), and it would provide petitioner with an ample opportunity to litigate its contentions.[8]

[8] There is no substance to petitioner's contention (Pet. 19) that the statutory review procedure is limited to "cases where the Board acts within its statutory authority but may have made an erroneous assessment of the facts or an erroneous application of the law to the particular facts before it." See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, is distinguishable for there, unlike here, the administrative remedy afforded no redress for plaintiff's claim (see L. Jaffe, *Judicial Control of Administrative Action* (1965), pp. 426-428).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

LINDA SHER,
Attorney,
National Labor Relations Board.

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DENIED